which the trial judge could properly rule that Dol was a participant in the offence?' That is the all-important question as appears from the judgment of Simonds L.C. in *Davies* v. *Director of Public Prosecutions*.[8]"

After the prosecution closed their case on November 10, 1972, the learned President having found that the prosecution had failed to prove that the signatures on P9 was that of the accused and that the handwriting expert (PW8) did not give his opinion with certainty she acquitted the accused without calling for the defence. When the appeal by the Public Prosecutor was heard in the High Court in March 1975, the High Court ordered that certain exhibits which were wrongly rejected by the learned President should be readmitted and reconsidered in the light of the other evidence. On August 1, 1975, hearing was resumed before the learned President and the handwriting expert (PW8) was again recalled and was asked to give his opinion on the signature of the accused on exhibits P6A-C (which were rejected earlier by the President.) The learned President after hearing the evidence came to the same conclusion as previously that the handwriting expert was not absolutely certain that the signatures on exhibits P3, P4 and P5 and the signatures on P6A-C were made by one and the same person and on that ground alone acquitted and discharged the accused.

Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. It has always been accepted that expert evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

On this basis let us recapitulate the evidence adduced by the prosecution. In all the prosecution called eleven witnesses to give evidence. PW1 was an officer of the Anti-Corruption Agency who lodged a report but the report was not admitted. PW2, another officer of the Anti-Corruption Agency, was the investigating officers. PW3, Director of Information, Perak, testified only in respect of the fact that the accused obtained the award of P.J.K. in 1959. PW4, PW8, PW10 and PW11 were the witnesses on the handwriting and signatures of the accused which had been dealt with already. Finally, PW6, PW7 and PW9, the applicants for the passports whose evidence had also been dealt with earlier. It can be seen therefore that of the four categories of witnesses only the last two would appear to be the witnesses whose evidence the prosecution relied on for the purpose of establishing a *prima facie* case against the accused in respect of the offence charged. Of the two categories obviously the prosecution relied heavily on the evidence of those witnesses who testified on the handwriting and signatures of the accused. Even if the learned President did not regard PW6, PW7 and PW9 as accomplices or that she believed them although no indication was made in her grounds of judgment the fact still remains that there must be some evidence to link the accused with the handwriting on the application forms P3, P4 and P5. PW8 was the handwriting expert. The other two witnesses were familiar with the handwriting of the accused. The cumulative effect of all their combined evidence cannot however be stronger than ordinary opinion evidence. Sarkar says it is certain that all such proof is even in its best form "precarious and often extremely dangerous." It has been well remarked that many persons write alike. In my view evidence of handwriting expert or experts by itself without any other corroborative evidence is not normally sufficient for the purpose of recording a definite finding. In this case there is of course a very strong suspicion but suspicion however strong can never substitute for *prima facie* case. Conclusions based on mere comparison of handwriting must at best be indecisive and yield to positive evidence — see *Guntaka* v. *Busetti*.[9] It has been said that the art of forming opinion by comparison of handwriting is essentially empirical in character and "error is seldom inseparable from such opinions" — see Sarkar on Evidence, 12th Edition, page 513. According to Glanville Williams it is a "fertile source of error" because the comparison of handwriting is a matter of opinion. Glanville Williams also correctly said in his book 'The Proof of Guilt' that the general practice which is extremely objectionable is to give the expert only two specimens of handwriting to pronounce upon — one the admitted handwriting of the accused and the other the disputed one. The expert if asked to find similarities will invariably find some similarities.

In this case in the final analysis the court would have to ask itself the question whether at the close of the prosecution evidence it could say certainly that the prosecution had established a *prima facie* case, which if unrebutted, would have warranted a conviction. I do not think one could honestly answer that question in the affirmative in this case.

For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: *Cheang Lee & Ong.*

N.T.S. ARUMUGAM PILLAI v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Chang Min Tat J.) September 13, 1976]
[Penang — Originating Motion No. 1 of 1976]

Revenue Law — Income Tax — Back duty investigation — Additional assessments — Some additional assessments statute-barred unless there was fraud or wilful default — Onus of proof — Whether rules of natural justice complied with — Income Tax Ordinance, 1947, ss. 69(1) & 76(3) — Income Tax Act, 1967, ss. 3, 91(3).

The appellant after a back-duty investigation was assessed to tax in the sum of $8,145,841.50. This included additional assessments for the years 1953, 1957 to 1959 inclusive which would be statute barred unless there was fraud or wilful default on the part of the taxpayer. Additional assessments were also raised for the year 1971 and assessments for the years 1962, 1966-1972. On appeal to the Special Commissioners it was ruled that the onus of proving fraud or wilful default for the statute-barred period was on the Revenue while the onus of proving that the tax assessed was excessive and erroneous was on the appellant. The Special Commis-

sioners also ruled that the appellant should begin and lead evidence first relating to the years of assessment after 1960. They also ruled that the time for the Revenue to prove the fraud or wilful default of the appellant in respect of the years of assessment 1953 and 1957 to 1959 was when it adduced evidence in reply to the appellant's case. If it succeeded in proving fraud or wilful default, then the onus of proving that the assessment was excessive or erroneous shifted to the appellant. The Special Commissioners after a lengthy hearing made a decision that the appellant's tax liabilities for the years in question was $10,323,230.75. The appellant appealed to the High Court.

Held: (1) the Special Commissioners were correct in ruling that the onus of proving fraud or wilful default in respect of the statute-barred years of assessment was on Revenue and that Revenue must prove fraud or wilful default beyond reasonable doubt. If and when Revenue had discharged this onus, the onus of proving that the assessments for the statute-barred years were excessive or erroneous passed to the taxpayer;

(2) in respect of the non-statute-barred years of assessment, the onus was on the taxpayer to prove that the assessments were excessive or erroneous. The taxpayer could discharge this onus on a balance of probabilities;

(3) in ruling that the taxpayer was to begin on the years of assessment that were not statute-barred and that the case in respect of the years of assessment that were statute-barred could be put to him in his cross-examination before Revenue proved fraud or wilful default, the Special Commissioners had not occasioned a denial of natural justice so long as the taxpayer was given the right to adduce evidence in rebuttal of Revenue's case on fraud or wilful default. On the facts the Special Commissioners had given this right to the taxpayer and also the conditional right to call further evidence in rebuttal in respect of the years that were not statute-barred, and the taxpayer had elected not only not to exercise the right but also not to call any evidence;

(4) it could therefore not be said that the taxpayer had not been heard or had in any way been prevented from or hindered in meeting the case against him;

(5) there was no justification for the inclusion of the notes of oral evidence taken before the Special Commissioners in the case stated and in any event, the case stated had been agreed to by his solicitors;

(6) the High Court on an appeal from a deciding order of the Special Commissioners is bound to decide the validity or otherwise of their order on the facts as found by them and the reasonable inferences drawn by them from such facts, unless there is no evidence to justify the findings or the wrong inferences were drawn;

(7) the taxpayer had not shown that the assessments of Revenue were excessive or erroneous or that the deductions claimed by him were those allowed by law. In all the circumstances of the case, it had not been shown that the Deciding Order of the Special Commissioners erred in any way.

[Editorial Note: For the text of the Deciding Order of the Special Commissioners, see [1976] 4 M.T.J. 95. At the time of going to press this matter was pending before the Federal Court.]

Cases referred to:-

(1) *Reg.* v. *Special Commissioners (ex parte Martin)* 48 T.C. 1.

(2) *Amis* v. *Colts* 39 T.C. 148, 163.

(3) *In re York and Harston's Contract* (1885) 31 Ch.D. 168.

(4) *Semtex* v. *Gladstone* [1954] 2 All E.R. 206, 218.

(5) *E.* v. *Commissioner-General of Inland Revenue* [1970] 2 M.L.J. 117.

(6) *Edwards* v. *Bairshow and Harrison* [1956] A.C. 14, 35.

(7) *Rosette Franks (King Street) Ltd.* v. *Dick (Inspector of Taxes)* 36 T.C. 100.

(8) *Ganga Ram Balmo Kanda* v. *C.I.T.*, Punjab II Reports of Income Tax Cases, 10.

(9) *J.P. Harrison (Watford) Ltd.* v. *Griffiths* 40 T.C. 281.

(10) *Commissioners of Taxation* v. *Kirk* [1900] A.C. 588, 592.

(11) *H.H. Co. Sdn. Bhd.* v. *Director-General of Inland Revenue* [1976] 1 M.L.J. 276.

(12) *U.N. Finance Bhd.* v. *Director-General of Inland Revenue* [1975] 2 M.L.J. 224.

ORIGINATING MOTION.

A. Jayadeva (*H.R Sankey, S.M. Ratnam* and *K. Chandra* with him) for the appellant.

Mokhtar bin Haji Sidin (Senior Federal Counsel) (*Abdul Rashid bin Abdul Manaff*, Federal Counsel, with him) for the respondent.

Chang Min Tat J.: The appellant, after "a back-duty investigation" by Revenue as to his tax liabilities, was assessed to tax in the sum of $8,145,841.50. This sum represented in part additional assessments for the years of assessment 1953, 1957 to 1961 inclusive and also 1971. The balance consisted of original assessments for the years of assessment 1962, 1966 to 1972, inclusive, in respect of which years no tax had previously been computed; in other words for those years returns were made by the appellant, showing no income chargeable to tax.

He appealed to the Special Commissioners. The hearing before them occupied a total of 30 days spread over nine months from December 3, 1974 to September 2, 1975. Oral evidence was taken from the appellant himself, and on behalf of Revenue from Mr. Sadasivam, an Assistant Director of Inland Revenue (Investigation) who was in charge of this back-duty investigation and who was himself a Chartered Accountant. Both witnesses were examined and cross-examined at length. A total of 240 exhibits were also introduced and considered. Finally on September 27, 1975, the Special Commissioners made an unanimous deciding order, assessing the appellant's tax liabilities for these years at a total of $10,323,230.75. They have therefore made an increase of $2,177,389.25 from the additional and other assessment by Revenue.

From that order, he now appeals to this court.

At this stage, a comparative table will be instructive:

Year of assessment	*Column A* *Tax assessed previously*	*Column B* *Tax as assessed & demanded by Revenue*	*Column C* *Tax assessed in Deciding Order*
1953	$ 5,006.00	$ 58,188.00	$ 161,062.80
1957	18,900.20	40,000.00	113,438.00
1958	63,386.20	11,606.00	37,091.20
1959	123,145.00	800,000.00	669,500.00
1960	68,080.60	360,000.00	615,575.25
1961	524,680.30	1,800,000.00	1,787,752.80
1962	Nil	901,158.85	1,010,921.50
1966	Nil	12,844.40	517,183.00
1967	Nil	101,710.00	631,126.25
1968	Nil	1,391,050.25	1,772,644.65
1969	Nil	244,540.60	399,368.35
1970	Nil	517,565.00	758,963.30
1971	Nil	150,687.50	(1,106,608.95
1971	—	670,665.90	(
1972	Nil	1,085,825.00	741,944.70
	$803,198.30	$8,145,841.50	$10,323,230.75

The years covered the operation of the Income Tax Ordinance, 1947 and after 1966, the Income Tax Act, 1967. Fortunately, nothing turns on any differences in the provisions of the two Ordinances. It is common to both that the period of limitation is 12 years. Claims for the years of assessment 1953, 1957 to 1959 inclusive are statute-barred unless there was fraud or wilful default on the part of the tax-payer: section 69(1) Income Tax Ordinance, 1947 and section 91(3) Income Tax Act, 1967. Claims for the other years are well within the period of limitation and under both statutes, the onus of proving that they were excessive or erroneous lay on the tax-payer: section 76(3) Income Tax Ordinance, 1947 and paragraph 13 of Schedule 5 to the Income Tax Act, 1967.

PART ONE

1. *The appellant and Inland Revenue*

The appellant was a man with many irons in the fire. He was engaged in money-lending, printing and publishing and in fragmentation of estates. The Special Commissioners found that he was adjudged a bankrupt in 1948 and that "before his discharge sometime in 1952 he had however started fragmentation business in his wife's name" with a capital of $10,000. Fragmentation, as it has been called, is the buying of large rubber estates and selling them in small lots.

On August 16, 1972, Mr. Sadasivam called the appellant for an interview. At that interview, the appellant maintained the correctness of his past income tax returns. Later the same day, Mr. Sadasivam went with the appellant to the latter's office at 132 Penang Street and residence at 216B Macalister Road, both in Penang. Another party of Inland Revenue officials went to his other office premises at 46 Jalan Arumugam Pillai, Bukit Mertajam, P.W. Both parties took possession of certain books and documents.

From these account books and documents, it was discovered that the appellant had maintained "more than one set of books for recording his business transaction." His income tax returns were compiled from one set, referred to by the Special Commissioners as the account books kept for income tax purposes, or ABIT. The other books were maintained for his own use and information, which I will now refer to as personal account books or PAB.

These accounts though relating to the same transactions do not tally. Invariably PAB disclose more information and show sales especially of his business in fragmentation at higher prices than are disclosed or shown in ABIT.

From them, Revenue was able to work out his "*modus operandi*" in fragmentation. His first receipt to a buyer of a fragmented lot or a lot under fragmentation was a "Tamil receipt." Subsequently after survey, the agreement was embodied in a legal document in English drawn up by solicitors and attested. Invariably the English documents stated a lower purchase price.

Since the profits of the appellant from his fragmentation business came from the excess of the selling price over his purchase price, recording the former at a lower figure must inevitably mean that the profits shown in ABIT were less. The difference between actual profits and recorded profits would be even greater if some of the transactions went unrecorded.

From PAB as compared with ABIT, Revenue was able or claimed to be able to extract facts and figures of what actually transpired in the appellant's fragmentation business, or at least a good part of it. Sometimes interviews with actual purchasers and brokers provided the missing evidence. At other times, where no records were found, based on the system adopted by the appellant and his usual margin of profits, Revenue endeavoured to reconstruct the transaction. This process of compilation did not appear to be too difficult for a chartered accountant and Mr. Sadasivam produced figures which he claimed represented as nearly as he could make it the actual transaction in fragmentation.

As is to be expected, in the course of investigating into the fragmentation business, dealings of other natures were discovered and Revenue made further assessments from the information uncovered.

2. *Unusual features*

This case however had certain unusual features which were the cause, or were made to be the cause of procedural and evidential difficulties and arguments. It is therefore necessary that I deal with them since the same objections are made to me. In the first place it is clear that the statute-barred years could only be re-opened if there was fraud or wilful default. The question then was on whom lay the onus of proving these charges. If it lay on the tax-payer, then the onus lay on him throughout of proving that the additional assessments were excessive or erroneous. There would then be no difficulty. He must begin and Revenue could, if it so desired, call evidence in reply. But if it lay on Revenue then obviously, if the whole case was heard in one session, difficulties would arise. The question would be the effect on the tax-payer's case if he began on the statute-barred years, in respect of which the onus did not lie on him.

Secondly, numerous documentary exhibits had been introduced in evidence. The appellant himself introduced some 34 documentary exhibits. In his cross-examination, Revenue put in another 76 exhibits, without as far as I can gather, any protest from the appellant. At this point Revenue indicated that it would end its cross-examination and further that there were many other documents to be produced. It did not desire to cross-examine the appellant on these documents which were mainly seized from the appellant, but would introduce them when it led evidence.

2.—(i) *Onus of proof*

The hearing before the Special Commissioners therefore opened with a ploy in the form of an argument whether the onus of proving fraud or wilful default lay on Revenue or whether the tax-payer had to prove that there was no fraud or wilful default on his part. Each side contended quite seriously that the onus lay on the other side.

2.—(ii) *Documentary evidence*

In accordance with the advice it had given the Special Commissioners in closing the cross-examination of the appellant, Revenue sought to introduce the other documentary exhibits at the time it led evidence. Counsel for the appellant objected on the ground that they should first have been put to the appellant during his cross-examination, and claimed that the appellant had been taken by surprise. Over this objection, Revenue introduced as many as 130 exhibits.

3. *Objection of appellant*

It is now contended before me with great vigour that the result of the ruling of the Special Commissioners, in spite of laying the onus of proving fraud and wilful default on Revenue that the appellant was nevertheless to begin and allowing the introduction of documentary exhibits by Revenue without first requiring Revenue to put them to the appellant was a denial of natural justice. It is said that as a consequence of the appellant being asked to begin on fraud though it was to be proved by Revenue, he was prevented from calling his witnesses. He also alleges to have been prevented from rebutting the case for Revenue on this issue. With regard to the documentary exhibits, it is submitted that they should be put to the appellant and he be given a chance to admit or deny ony of them and further that he should be allowed to call evidence to explain the documents.

4. *The law of procedure and evidence in hearing before the Special Commissioners*

The law is contained in Schedule 5 to the Income Tax Act, 1967. The relevant paragraphs are:

"10. One of the Special Commissioners may order—

(a) two or more appeals by the same person or

(b) ....

to be heard together.

19. The Special Commissioners shall have....

(f) subject to section 142(5), power to admit or reject any evidence whether oral or documentary and whether admissible or inadmissible under the provisions of any written law for the time being in force relating to the admissibility of evidence.

22. Subject to this Act and any rules made under section 154(1)(d) the Special Commissioners may regulate the procedure at the hearing of the appeal and their own procedure."

Now, section 142(5)(i) and section 154(1)(d) of the Act are not of relevance in this connection. The former preserves the effect of the provisions in the Evidence Act, 1950 relating to witnesses, while sub-sub-section (ii) removes the cloak of privilege from a tax-payer's documents and communications. The latter provides that the Minister of Finance may make rules regulating the practice and procedure in appeals to the Special Commissioners and the Special Commissioners' own procedure.

So far as I can discover, no rules have been made and the matter stands to be considered in the light of the above.

On this, it is apparent that the Special Commissioners may largely regulate the procedure at the hearing before them, subject always to the important consideration that the appellant must be given a full and adequate hearing or reasonable opportunity to be heard. The Special Commissioners were aware of their right to regulate procedure and also of the great advantage in not being hide-bound to a rigid code of procedure. They relied on *Reg.* v. *Special Commissioners (ex parte Martin)*[1] where Lord Widgery at page 7 said:

"It is very important that the procedure before the Commissioners should be kept as flexible to deal with widely varying types of cases which came before them."

It is, with respect, a most apt quotation.

5. *Ruling of the Special Commissioners on (i) onus*

The Special Commissioners found in *Amis* v. *Colts*[2] a case similar to the one they were dealing with. In that case the U.K. Inspector of Taxes had accepted that it was for him to satisfy the Commissioners on fraud and wilful default on the part of the tax-payer in respect of the statute-barred years. Cross J. indicated the procedure that could be adopted and said:

"It is clear that the onus of establishing that a case falls within the meaning of that proviso (to section 47 of the United Kingdom Income Tax Act 1952) lies on the Crown and the Inspector representing the Crown on the appeal could have taken one of two courses. He could, if he had liked, have opened his whole case on all the years, calling all his evidence as though the onus was on him to support all the additional assessments. Alternatively, he could first call such evidence as he thought fit to establish fraud or wilful default which he was alleging in connection with the first five years and could then ask the Commissioners to decide whether he had made out his case on that point. If they decided that point against him, then those years could be struck out altogether and the matter would proceed on the other years...."

This suggestion was approved by Lord Widgery C.J. in *Martin's* case, *supra.*

In the event, neither Revenue nor the Special Commissioners took either of the courses suggested. After hearing arguments, the Special Commissioners ruled that the onus of proving that the assessments for the years of assessment 1960 to 1972 inclusive were excessive and erroneous was on the appellant who should begin and lead evidence first relating to those years of assessment. They also ruled that the onus of proving the fraud or wilful default of the appellant in respect of the years of assessment 1953 and 1957 to 1959 inclusive was on the Revenue and that the time for doing so was when it adduced evidence in reply to the appellant's case. If it succeeded in proving fraud or wilful default, then the onus of proving the assessment excessive or erroneous shifted to the appellant.

This ruling was given on the first day of the hearing on December 3, 1974 and the hearing before the Special Commissioners was conducted on the basis of it. On this ruling the appellant began and it was expected that in accordance with this ruling he would open his appeal with attempting to discharge the onus that lay upon him to prove that the additional assessments for the years of assessment 1960-1972 (inclusive) were excessive or erroneous and that the question of fraud or wilful default in respect of the years of assessment that were statute-barred would be left for cross-examination by Revenue since it was not his duty to open on this issue. He would have the right to call evidence in rebuttal of Revenue's contention in this matter.

The Special Commissioners also ruled that Revenue was to prove fraud and wilful default beyond reasonable doubt but the burden on the appellant to rebut the case against him was on a balance of probabilities.

I would at this stage refer to the ruling of the Special Commissioners that the onus of proving fraud or wilful default was on Revenue. Before them, Revenue contended that the onus lay not with it but on the appellant. Revenue's contention was rejected. Before me, counsel for Revenue again attempted to submit that the Special Commissioners were wrong on this. With the greatest of respect, the decision of the Special Commissioners was, in my view, so eminently correct that I made it quite clear that it would be a waste of time for Revenue to contend otherwise before me, and I also pointed out that, in any event, Revenue had not preferred any appeal from that ruling.

5. (ii) *Admission of Documents by Revenue*

The Special Commissioners ruled on July 22, 1975, after hearing a substantial objection, that Revenue could introduce all the documents it sought to put in after R.111, through its witness. To that ruling, they attached a rider, that the appellant had, as a matter of law, the right to lead evidence in rebuttal but before evidence was adduced on any fact, the court would have to be satisfied that the appellant had been taken by surprise on that fact. The documents were in accordance with the ruling admitted. The last document was numbered R.240.

It was obvious that the Special Commissioners considered but over-ruled the objection because it found that almost all the documents from R.112 to R.240 were documents seized by Revenue from the appellant. The Special Commissioners also considered that in the events that happened, the appellant had been given adequate opportunities and he did exercise the right to take copies of and cross-examine on all those documents of his which had been seized by Revenue. In these circumstances, they made the ruling with the attached rider. In other words, the Special Commissioners left the issue open so that at the close of the case by Revenue the appellant had two courses open to him: (1) he could lead evidence as a matter of right in rebuttal of fraud or wilful default with which he was charged in respect of the statute-barred years; and (2) if he could satisfy the Special Commissioners that he had been taken by surprise in respect of any fact in the years of assessment that were not statute-barred, he would then be given the right to lead evidence in rebuttal.

6. *Election by the appellant*

But without attempting to take both these courses the appellant through his counsel informed the Special Commissioners that he elected not to call any further evidence in reply to show that the assessments for the statute-barred years were excessive and erroneous or to give any evidence in rebuttal on any fact in relation to the assessments for the other years. This was, as I see it, a deliberate choice on the part of the appellant and if this was so, then he cannot now be heard to contend that he was never heard or to submit that he was denied any opportunity of being heard. I would also observe that if the statement is correct that, in so far as the statute-barred years were concerned, the appellant elected not to contend that they were excessive or erroneous, it must mean as a necessary inference that he did not any longer contend that there was no fraud or no wilful default on his part so as to prevent Revenue from re-opening the assessments of those years.

7. *Fraud and wilful default*

It is perhaps convenient at this stage to deal with the Special Commissioners' finding of fraud and wilful default.

It was shown to them that the appellant had maintained two, if not three sets of books and that in ABIT there were many omissions and under-statements of receipts of moneys and there was the admission by the appellant during cross-examination that his accounts were incorrect. In his evidence as the Special Commissioners observed and instanced, the appellant contradicted himself and he was evasive and sometimes flippant. On this and other evidence, the Special Commissioners came to a finding that there was not only fraud, on which Revenue relied, but also wilful default as defined by Bowen L.J. in *In re York & Harston's Contract*[3] on the part of the appellant in respect of the statute-barred years.

The Special Commissioners also found that Revenue had proved fraud and wilful default to their satisfaction beyond reasonable doubt, which they accepted as the proper standard, as laid down in *Amis* v. *Colts*.[2]

With respect, I cannot see how they are wrong. On the primary fact that the appellant had submitted returns of his income from figures in a special set of books kept for income tax purposes, which not only demonstrably but on his own admission were inaccurate, apart from other evidence, the only possible inference must be that he was in fraud of Revenue and he had shown wilful, not merely negligent, default in the discharge of his duties to render accurate returns. That inference must in the circumstances become an established finding of fact.

On the finding of fraud and wilful default, the onus then shifts to the appellant to prove that the additional assessments for the statute-barred years of assessment were excessive or erroneous.

8. *Additional assessments*

The provision for additional assessments where any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged is in section 69 of the Income Tax Ordinance, 1947 and in section 91 of the Income Tax Act, 1967. It will be apparent that in such circumstances, the Comptroller or his successor in office, the Director-General cannot act on precise and exact information, which is known only to or is within the special knowledge of the taxpayer. The law then, while empowering him to make such additional assessments, requires him to act "according to the best of his judgment." It must be noted that

he is required to act not on the information available to him which will make the tax law ludicrous but Revenue must be reasonable. However Revenue must not act "capriciously, vindictively or dishonestly" in the words of the Special Commissioners.

The additional assessments were made known to the appellant in the statutory notices of demand. The demands for the various years appear in Column B in the comparative table I have set out above. It is true that no details were shown, but there is no requirement at law on the part of Revenue to particularise and set out the details for the various sources of income. However, when it came to adduce evidence, Revenue compiled figures which it said represented a fair estimation of the income of the appellant from his various activities and transactions. These figures were set down conveniently in the sheet called a Compilation of Income and Tax understated for the years of assessment 1953 and from 1962 to 1972. It was marked R.233 and a copy of it was given to the appellant.

An explanation was afforded by Mr. Sadasivam, Revenue witness, for this compilation. The view of the Special Commissioners of this explanation is expressed in these words:

"However we were satisfied after hearing the explanation of Encik Sadasivam that Revenue had in the circumstances of the case used a reasonable and conservative basis for estimates in assessing the appellant's taxable income."

and that was because

"We were satisfied that where records were available, Revenue had used the actual figures recorded in the appellant's genuine books which were found and seized in his premises. Where records were not available, Revenue had, as it was legally entitled to do so, made estimates of the appellant's income after studying and analysing relevant available records of the appellant for the years of assessment in question. Encik Sadasivam denied under cross-examination that the estimates were dishonest or highly-inflated and we had no good and satisfactory reasons to think that or to reduce Revenue's estimates as shown in R. 233, which the appellant on whom the onus lies, had failed to show were excessive or erroneous. The appellant has also not shown positively what must be done to justify us in amending or correcting the figures of Revenue's estimates of his income and tax payable as shown in the said exhibit."

To my mind, *ex facie* the statement of the case, this view of the Special Commissioners is completely justified. It is in fact not attacked by counsel for the appellant. Perhaps he means to keep the attack in reserve as the point he makes is that the exhibit R.233, with others, should have been supplied to the appellant long before the hearing, so that the appellant could produce the evidence to disprove it. This failure of early service is said to be a denial of natural justice. With respect, this contention ignores the explanation of Mr. Sadasivam that the figures were partly the appellant's who must be taken to know them. It also begs the question that in respect of these figures and of the other figures which are estimates, the onus lies on the appellant to prove that they are excessive or erroneous. It could not challenge that the Director-General had not acted in his best judgment.

It may not be out of place to note that R.233 which generally contended that the additional assessments by the Director-General even then erred on the side of leniency, nevertheless in at least two years of assessment reduced the estimated assessments of the Director-General. For 1959, the assessment was reduced from $800,000 to $669,500 and for 1961, from $1,800,000 to $1,787,752.80. The reductions especially in the later year may not amount to much but I should have thought that they offer proof at least that Revenue was not acting maliciously, vindictively or dishonestly.

Nevertheless the appellant argues that he has been denied natural justice.

9. *Natural justice*

Natural justice requires that the appellant be given a full and adequate hearing, and opportunity to give evidence on behalf of himself if he so desires and to call such witnesses as he considers necessary for his case. It is said however that the ruling of the Special Commissioners is a denial of justice, because, as I understand the submission, it means that the appellant began on the issue of fraud and wilful default and he was prevented from calling his witnesses, or to rebut the case for Revenue. With respect, I do not think that merely reversing the role by asking him to avail himself for cross-examination on this issue before Revenue led evidence on it, is to deny him his basic right to have the case on this issue proved against him beyond reasonable doubt, so long as he was accorded the right of reply. The fact is, he was and his willingness to lead evidence on this point in examination in chief and his deliberate election to call no evidence in rebuttal did not detract from his right to being heard. So long as he was given the opportunity, he would not be denied natural justice whether or however he availed himself of that opportunity.

The Special Commissioners have of course the alternative of deciding to hear the appeal to them in two parts. On the issue of fraud and wilful default, Revenue could open and the appellant reply. On the non statute-barred years where the onus lies on the appellant, he should open and Revenue could challenge his evidence either under cross-examination or by adducing its own evidence. Perhaps in hindsight, the Special Commissioners should have adopted this course. But quite frankly and with every respect, I cannot see how this course can be any more advantageous or fairer to the appellant than the course adopted by the Special Commissioners, which I would repeat is well within their province to adopt. To split the hearing into two sessions when the financial affairs of the appellant are continuous and closely inter-woven would, on the other hand, appear to lead to more confusion. Neither can I, with respect, see any advantage over another course which is for Revenue to begin on the statute-barred years. If the course adopted by Revenue had been strictly followed, this course would have been the result, the evidence of the appellant in rebuttal would be his defence to the charges of fraud and wilful default.

The complaint of a denial of natural justice is made in regard also to the documentary exhibits, from R.112 to R.340 which Revenue did not put to the appellant but which Revenue introduced when it came

to give evidence. It might of course be better if they had been put to the appellant for him to identify and admit when he was being cross-examined. Other documents had been put to him. But, on the other hand, the documents complained of were almost entirely seized from the appellant. If the appellant wanted to challenge any of them, either in regard to their genuineness or their accuracy, he could have done so during the cross-examination of Revenue's witness, or if he was taken by surprise, he could have asked for an adjournment. Several adjournments were given him and he was also given the opportunity of taking copies of the documents which had been seized by Revenue from him. Having regard to these circumstances, he could not be said to have been taken by surprise and he had every opportunity to challenge the contents of the documents in cross-examination by such questions such as "Could not this document also mean this and not what you say it meant?" He also had the opportunity of calling evidence in rebuttal which he failed to exercise.

Be that as it may, every argument by the appellant was made to turn on the denial of an adequate opportunity to meet the case against him from the ruling of the Special Commissioners. But each and every argument by the appellant ignores the right given to him to call evidence in rebuttal of fraud and wilful default and the conditional right to call other evidence and to his deliberate election not to call any evidence of either kind. And I have not heard one word in explanation for this election nor have I been in any way given any cogent reason how it can be said that the appellant had been denied the opportunity of being heard or of meeting the case against him.

Natural justice is not something which any one of us can define in our own terms. It is basic. In the words of Finnemore J. in *Semtex* v. *Gladstone*[4] at page 212:

"I hope the law of this country and natural justice will approximate as closely as possible, but all claims and legal defences have to be grounded in law and not according to somebody's idea of natural justice, not even that of the Judge who may hear the case."

For myself, I am with respect not persuaded that there has been a denial of natural justice or that the appellant has not been heard or has been in any way prevented from or hindered in meeting the case against him.

10. *Application for the notes of evidence*

An application for a part of the notes of evidence taken by the Special Commissioners was made before the hearing of the case stated to my brother Arulanandom J. According to the minute made by him, it was only for the evidence relating to (a) the export of gold, currency, diamonds and other valuables, in item (v) and (b) bonus and salaries in item (ii) at page 3 of the Deciding Order. On further consideration, Arulanandom J. dismissed the application. I am advised that an appeal has been lodged from his decision to the Federal Court. Before me, this application is repeated and I am asked to adjourn the hearing until the notes are supplied. The appeal is also made a ground for an adjournment. It is said that the evidence is necessary for the argument of the appeal, but before me, the evidence required is stated to be the evidence realting to the export of jewellery and the interests charged and alleged to have been received by the appellant and not accounted for. There has been between the two hearings a change in the request regarding bonus and salaries to one regarding interests. I do not know whether this change is intentional or whether there is any significance in it. But it is quite clear that the statement of a case does not ordinarily include the evidence, and certainly not the notes of evidence recorded verbatim. By definition, it states the facts as found by the trial officers. Paragraph 37 of Schedule 5 to the Income Tax Act, 1967 provides that

A case stated under paragraph 34

(a) shall set forth the facts as found by the Special Commissioners, the deciding order and the grounds of their decisions; and

(b) shall be signed by the Special Commissioners who heard the appeal.

There is therefore no justification for the inclusion of the notes of the oral evidence taken before the Special Commissioners.

But a taxpayer in the position of the appellant is not without safeguards as to the sufficiency of the statement of the case for the purposes of his appeal. The procedure as laid down in *Simon's* Income Tax (1964-65 Edition) Vol. 1, paragraph 749, page 304, has since been made a direction by the Federal Court in the case of *E.* v. *C.G.I.R.*[5] The Special Commissioners are now required, before finalising the statement of the case, to seek the views of both Revenue and the taxpayer. If they have done so, and the parties have agreed, if necessary, after amendments, to the final form of the case stated, then neither party can afterwards take objection either to the form or to any alleged insufficiency of the statement.

I therefore sought advice from counsel for the appellant and for Revenue whether this admirable practice direction had been followed. Revenue advised that the practice was followed and would refer to a letter from the solicitors for the appellant that they approved the draft which had been sent to them and they had no amendment to make or addition to ask for. Counsel for the appellant, after consulting the solicitors, confirmed that this was so.

In the scheme as envisaged in Income Tax legislation, the time and place for adducing evidence and for coming to findings of fact on it were before the Special Commissioners. The High Court on an appeal from their Deciding Order is bound to decide the validity or otherwise of their Order on the facts as found by them and the reasonable inferences to be drawn from them. There have been many decisions which say that the High Court is not entitled to differ from the Special Commissioners on the facts as found by them; but of course, in the case of inferences, the High Court may consider if they are rightly drawn from the facts found.

The following statement on the procedure of a hearing in the High Court on a case stated by the

Special Commissioners is lifted bodily from *Simon's* Taxes (3rd Edn.) Vol. A, at page 672-3; and in view of the application, I make no excuse for so doing:

> The High Court only considers appeals on questions of law, and will not disturb a finding of pure fact by the General or Special Commissioners, unless there is no evidence to justify the finding, or where incorrect reasons of law prompt their conclusions of fact, or where the Commissioners have taken an erroneous view as to the nature and effect of a document, or have applied erroneous tests in arriving at their conclusion, or have otherwise misdirected themselves in law, or drawn a wrong inference from the facts. The court has sometimes treated what is described in the case stated as a question of law as one of fact; it decides on the case what the nature of the problem is, and will not decide a question of fact merely because the case says that it is one of law, *et e contra.* The court will give effect to any point of law arising on the facts stated in the case, but where it is sought to raise a question which was not raised before the tribunal below and this depends upon further evidence being taken, the court will refuse to give effect to the point so sought to be raised.

The principles have been stated by Lord Radcliffe in *Edwards* v. *Bairstow and Harrison*[6] at page 35:

> "I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie,* it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So, there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur."

In the instant case, while the evidence before the Special Commissioners was not reproduced *verbatim,* the statement of the case filled up 100 full pages. In an exhaustive and very well written statement, the Special Commissioners have gone out of their way to reproduce as much of the evidence as in their opinion was relevant. They have stated this evidence fully but in concise forms. They have also noted the source of the evidence, and I repeat, they have shown that the evidence of Revenue to prove fraud or wilful default and understatements of chargeable income came from the appellant's own books. They have also the reconstructed unrecorded dealings and finding them to conform to the appellant's general practice and margins they have accepted them as representing the truth. The appellant has or ought to have the means to prove that the entries in the PAB were wrong. He did not use them. He had not even shown or said one word in explanation why he kept two divergent sets of books for his transactions and dealings. And I repeat the onus was at all times on him.

In all the circumstances, it seems to me, without, of course, purporting to sit on appeal from the decision of Arulanandom J., that there is no reason or no sufficient reason for granting an adjournment of the hearing on this ground.

11. *Further application for adjournment*

A further application for adjournment was made at the end of appellant's counsel's submission on natural justice on the first day. It was founded on personal grounds. It was with some regret that having regard to the costs of the hearing, I felt that I could not grant a long adjournment and that the only justifiable adjournment I could grant was to the next day.

I need only say how relieved I was the next day to be supplied with a written submission and to hear an oral submission from appellant's counsel which was full and comprehensive and covered all points raised in the appeal in such a way as frankly to arouse my wholesome admiration, and therefore to find that I had caused no injustice to the appellant.

PART TWO — VALIDITY OF THE DECIDING ORDER

1. *The facts found by the Special Commissioners*

The facts found by the Special Commissioners in summary form and under particular headings are as follows:

(i) *Rubber-estates fragmentation business: sales.*

An amount of $7,419,106 as in the following table: —

Year of Assessment	*Amount of Fragmentation Profits omitted and/or understated.*
1953	$ 542,916.00
1957	283,595.00
1959	1,003,013.00
1960	680,482.00
1961	2,569,226.00
1962	914,598.00
1963	20,606.00
1964	178,162.00
1965	23,518.00
1966	68,388.00
1967	581,770.00
1968	198,162.00
1969	8,000.00
1970	149,170.00
1971	197,500.00
	$7,419,106.00

has not been accounted for by the appellant either by understatements or by omissions.

(ii) *Rubber-estates fragmentation business: Interests received from sub-purchasers.*

The amount estimated by Revenue at $10,000 for each of the years 1960 and 1968 to 1972 and at $20,000 for each of the years 1961 to 1967 was upheld by the Special Commissioners.

(iii) *Rubber-estates fragmentation profits (Juru Estate).*

The appellant sold a part of Juru Estate of an area of 627 acres which he had held in his own name for some time for $327,064, and claimed that this sum represented capital accretion. The Special Commissioners rejected this contention and treated it as income from the fragmentation business chargeable to tax.

(iv) *Rubber fragmentation business: penalties paid to Vendors.*

In respect of Trans-Krian Estate, the appellant paid two penalties of $72,857 and $30,000 for the years of assessment 1962 and 1963 respectively for the delay in completion but the delay in each case was occasioned by the fact that the appellant had remitted to India moneys which he had collected from the sub-purchasers. Had he retained the collections, he would not have incurred the penalties.

(v) *Interests paid to banks.*

From 1958 to 1972, the interests paid by the appellant to various banks aggregated $511,069 which were disallowed as deductions since the borrowings were in respect of (vii) below or of matters unconnected with his businesses and in the production of income.

(vi) *Bonuses to employees (a) Suppiah and (b) Ayavoo.*

Claims for $15,000 bonus paid to Suppiah whose ordinary salary was $95 p.m. and for $1,000 bonus paid to Ayavoo, a driver whose salary was $500 p.m. were found to have not been paid.

(vii) *"Business out-go".*

The various sums claimed by the appellant by way of "business out-go" as deductible expenses in his businesses were found to be remittances to India not connected with any such businesses, gifts to relatives in cash or in the form of jewellery, payment of life insurance premia on the lives of others, donations to unapproved charities, purchases of shares, repairs to and expenses in connection with his residence and the purchase of a property in Market Street Penang which had nothing to do with his business. The Special Commissioners found the term "business out-go" misleading and held that all the above items under this heading were not properly allowable as deductions.

(viii) *The appellant's artivities concerning currency, jewellery, gold articles and other valuables.*

The Special Commissioners found from the numerous remittances other than through official channels of currency to India exchanged at inflated black-market rates and purchases and despatches of jewellery, gold, diamond and goods in short supply or under prohibition in India, that the appellant had been carrying on a business of dealing in foreign exchange and of export; and assessed him to tax on sums computed by them as representing his profits. The sums totalled $7,150.000.

(ix) *Losses incurred by a newspaper Tamil Malar published by the appellant in Malaysia.*

A sum of $80,896 claimed for loss sustained was in fact incurred by the Singapore Branch and not in Malaysia.

(x) *Loans to the Malayan Times and one V.M. Sundram.*

The loans totalled $675,707 and were not a trading debt but an investment written off when Malayan Times folded and an interest-free loan to V.M. Sundram.

On the facts as found by the Special Commissioners the arguments not surprisingly before them and in this court on the chargeability of the appellant did not turn much on law, and such submissions as there were pertinent to the case, apart from the procedural arguments, were basically addressed to the question whether the appellant had been correctly assessed to tax, save possibly in one matter to which I shall allude later. There could be no question as to his chargeability on the income derived from the appellant's fragmentation activities. They had all the marks of and were consistent enough to constitute a business within the statutory definition of business. The difference between the appellant and Revenue concerned the amounts of the profits accruing or derived from the business. This normally would be a matter of accounting and the relevant figures could be extracted from the account books of the business. It was a matter essentially for the Special Commissioners to determine. The side issues, if I may so call them, are the deductible expenses and in the context of this case would include the penalties paid to the vendors, the interests paid to the banks on the overdrafts taken by the appellant, the bonuses to employees and the so-called "business out-go." On the plus side, they are the interests received from the various sub-purchases and the sale of a part of Juru Estate which was retained for some time by the appellant after the rest of it had been fragmented and sold.

There are three other heads of revenue, which I shall deal with in their turn.

2. In a hearing before judicial officers or persons exercising judicial functions involving the findings of facts and the determination of law, the question of the credibility of a person as a witness very often arises. A litigant or a witness on his own behalf should have regard to his interests and he can best safeguard them either by producing evidence which is irrefutable or giving evidence in such a manner as to convince or at least persuade the tribunal of the probability of his case. But if his evidence is demonstrably contradictory or false, then the question of his demeanour or the manner in which he gave his evidence loses much though perhaps not all of its significance. It is therefore necessary to see how the appellant appeared as a witness to the Special Commissioners.

He testified before the Special Commissioners for a total of 10 days, equally divided between his examination-in-chief and cross-examination. The Special Commissioners had ample opportunities of hearing and observing him. They had no difficulty in arriving at the conclusion that he was not a witness of truth.

They found he had contradicted himself and was lying. They noted several instances of such contradictions and untruths.

The Special Commissioners also regarded the fact that the appellant kept several sets of account books and found many instances where the amounts of moneys received as recorded in his ABIT differed from the entries in his PAB. They noted the examples. It was not merely a case of under-statements. It was also a case of omissions, so that his account books taken together did not disclose a full or accurate account of his income. From the absence of any reference to it in the statement of the case, the Special Commissioners also did not appear to have received any explanation why several sets of account books had been kept or any proof of the real transactions undertaken by the appellant. They could therefore give no real credence to the account books, but obviously the account books must be a starting point in the discovery of the appellant's tax liabilities.

From Mr. Sadasivam, the Special Commissioners obtained a method of approach, or rather they obtained an explanation of how Revenue arrived at the revised computation of the appellant's income as summarised in Exhibit R233. Mr. Sadasivam explained that where records were available in the appellant's PAB, he used the actual figures recorded. Where they were not, he made estimates of the appellant's income after studying and analysing his available records.

This method was attacked by the appellant, not because it was wrong but because it was said to produce or to be used to produce assessments that were "dishonest or highly inflated." How it did did not appear to have been explained to the Special Commissioners. It has certainly not been explained to me.

The Special Commissioners held that Revenue was legally entitled to do so. I agree. For myself, I am unable to see how applying the ascertained pattern from the appellant's known transactions to the unrecorded ones and using the same margins is inherently wrong or dishonest. On the other hand, I consider this a fair yardstick. Revenue could possibly use a bigger margin of profit, *e.g.* in fragmentation during the years when to its knowledge, fragmentation was the popular means to become rubber plantation owners. It did not. It used the same margin.

And as submitted by Revenue, there is good authority for this approach. This is apart from sound common sense. Cases such as *Rosette Franks (King Street) Ltd.* v. *Dick (Inspector of Taxes)*[7] and *Ganga Ram Balmokandu* v. *C.I.T.*,[8] which it relied on, establish that from one proved or admitted incident of suppression or omission of income, Revenue is entitled to infer that there are other similar incidents. In my view, Revenue had throughout acted correctly according to its judgment, section 69 Income Tax Ordinance, 1947 or to the best of its judgment, section 91 Income Tax Act, 1967.

In any event, the onus is on the appellant to prove Revenue wrong and the assessments erroneous or excessive and he cannot obviously be said to have discharged this onus by merely saying Revenue wrong without showing how it was wrong and without pointing to facts and figures, which it should have been possible for him to do, if he had kept consistent books of accounts which he was required to do: see section 63 Income Tax Ordinance, 1947 and section 82 Income Tax Act, 1967, or if he had been more frank with the Special Commissioners.

Bearing all these in mind, in particular the onus that lies on the appellant I now deal with the various heads of assessment.

(i) *Rubber-estates fragmentation business: sales.*

The figure of $7,419,106 of omitted or understated profits was not challenged. There was even an admission by the appellant that his accounts and consequently his returns were incorrect.

No objection is also taken before me. There would appear to be no appeal on this item. In any event, if there is, the appellant has not shown to the Special Commissioners or to me how this figure erred in principle and in quantum.

(ii) *Interests received from sub-purchasers.*

Instances of the receipts of such interests were found in the appellant's books of account. They were not declared in his returns. Revenue was not confident that what were recorded were all the interests received. It therefore made estimates of the omitted interests.

Interests received from sub-purchasers which enhanced the purchase price because of some temporary default on their part must add to the appellant's profits and it is never disputed that they were chargeable to tax. As for the amount, it was for the appellant to persuade the Special Commissioners that Revenue's estimates were excessive. It was not for him to query the Special Commissioners or me whether the estimates were correct, as he sought to do.

(iii) *Juru Estate.*

It was conceded and the concession is repeated to me that the sum of $324,064 realised from the sale of a part of Juru Estate which the appellant had retained for some time after the rest of the estate had been fragmented and sold, was not capital accretion but a profit from his fragmentation business. I am sure appellant is, in this instance, correct.

(iv) *Penalties paid to Vendors in 1962 and 1963.*

They were paid when the appellant failed to complete within the time stipulated and to obtain an extension of time for completion. They would ordinarily have qualified for deductions as expenses, but in the context of the evidence uncovered by Revenue that they need not have been paid and that the appellant was in a position to complete within time, had he not remitted large sums of money to India for his own purposes wholly unconnected with his fragmentation business from moneys received from his sub-purchasers which should have gone in the first place towards buying the estates concerned, Revenue disallowed the claim for deduction and the Special Commissioners, in my view entirely correctly, upheld the disallowance. To qualify for deductions under section 14 Income Tax Ordinance, 1947, they

must be "expenses wholly and exclusively incurred ... in the production of the income," and it cannot be said by any stretch of the imagination that these penalties were of this description.

But the appellant does not appear to resist this decision.

(v) *Interests paid to Banks on overdrafts.*

The appellant claimed that such interests should be allowed as deductions. The Special Commissioners in their grounds of decision accepted the contention of Revenue that the amounts of the overdrafts were not utilised as capital and that they were in fact used for purposes other than in the production of income.

The contention of the appellant before this court is that the sums were used partly for personal and partly for business purposes. Therefore there should be an apportionment of the interests. But before the Special Commissioners, he claimed that the interests paid over the years were deductible in full, which was a very different argument.

In any event, it is for the appellant to show that the interests paid were paid on "any money borrowed by (him) where the Comptroller is satisfied that the interest was payable on capital employed in acquiring the income," section 14(1)(a) Income Tax Ordinance, 1947, or "upon any money borrowed by (him) and employed in that period in the production of the gross income from that source," section 33(1)(a) Income Tax Act, 1967. It does appear to me that not only had the appellant failed to satisfy the Special Commissioners that the interests came within the scope of the permissible deductions but also that the contention of Revenue which the Special Commissioners accepted must mean that there is no question of apportionment.

(vi) *Bonuses to employment.*

From the contradictory evidence in the appellant's books as to the payment of bonus to Suppiah Pillai, an employee, and from the information advanced by Ayavoo, a driver, that he was not paid his bonus, Revenue disallowed all bonus payments claimed in the appellant's returns up to the year of assessment 1962. It would however appear from R.233, that the claims for the years of assessment 1963 and 1964 were also disallowed.

This is a question of fact and not law. If the bonuses had been in fact paid, they were deductible. On the issue whether they were in fact paid, the Special Commissioners found in favour of Revenue that they were not paid and so any claim for deduction would be fictitious. It is however submitted that there was no evidence to support the finding of the Special Commissioners but it is at the same time conceded that the appellant did not produce the relevant witnesses, though it could have asked for their attendance. But with respect, it is the application of the rule, if I may so call it, of *Rasette Franks Ltd.* v. *Dick, supra* and section 69 and section 91 of the respective ordinances and so long as it cannot be or has not been shown that the judgment of the Comptroller was incorrect or that the Director-General had not acted to the best of his judgment, as to which, I repeat if somewhat monotonously, the onus lies on the appellant, then the only course left to this court would be to uphold the assessments.

(vii) *Business out-go.*

From the description of the nature of the expenditure under this head in the facts found, it is clear and beyond argument that they did not qualify as expenses properly deductible under the tax laws, not being wholly and exclusively incurred in the production of the income.

Under this head were included the inflated wages alleged to have been paid to his employees which were in fact not paid.

Not surprisingly therefore, the appellant does not attempt to dispute the correctness of the decision to disallow such deductions.

(viii) *Trading in gold, foreign exchange and valuables.*

Revenue alleged and adduced evidence of the many activities carried out by the appellant in sending gold articles and other valuables to India, as well as dealings in foreign exchange. The evidence revealed many such dealings and the Special Commissioners went to some pains to set out this evidence. On this evidence the Special Commissioners found as a fact that the appellant was carrying on a trade or a business in gold and valuables as well as on foreign exchange. It is contended and by far the greater part of the appeal is taken up with this contention, that the finding was wrong in law and in fact.

From the extent of the dealings, the Special Commissioners considered the export of the gold to be more than was reasonably required for the appellant's family in India, even having regard to the status of the appellant. The Special Commissioners rejected the contention that they were all of a private nature and not for profit. The Special Commissioners noted that in the circumstances then prevailing, the export of gold and valuables in short supply in India and the provision of foreign exchange made for enormous profits or at least provided great opportunities for such profits which must be tempting to anyone interested in money. The finding is one that is entirely within the competence of the Special Commissioners to make. There is evidence even in the summary form in which it appears in the statement of the case to support such a finding. The Special Commissioners it seems to me, have applied the test to the facts of the case which is expressed by Lord Guest in *J.P. Harrison (Watford) Ltd.* v. *Griffiths*[9] in these words:

"No doubt if it is established that a transaction is entered into with the evident intention of making a profit, that may be a strong indication that the Company was trading. But the corrollary by no means follows that the absence of an intention to make a profit or the intention to make a loss, negatives trading. The test is an objective one. The question to be asked is not, *quo animo* was the transaction entered into, but what in fact was done by the Company."

If it is contended that this was an inference and not a finding of fact, then, with respect, it is nevertheless such an inference that is capable of becoming or being itself a finding of fact, within the dictum

of Lord Radcliffe in that part of his judgment in *Edwards* v. *Bairstow & Harrison, supra,* which I have earlier quoted.

It will be completely unjustified on my part, in the absence of any conclusive argument or facts pointing to the contrary, to differ. I must, with respect, accept this finding of fact as being firmly established.

But on one point the Special Commissioners were, with respect, in error. They treated the incomes assessed by Revenue and accepted by them as being reasonably to be assessed on this trading in gold and valuables and foreign exchange as if caught throughout by the provisions of section 10 of the Income Tax Ordinance, 1947 for the levying of income tax on the income of any person "accruing in or derived from the States of Malaya or received in the States of Malaya from outside the States of Malaya." The last year of operation of the Ordinance was 1967. For the year of assessment 1968 and thereafter, the provisions of the Income Tax Act, 1967 applied. And for the years of assessment 1968 to 1972, income tax was by section 3 of the Income Tax Act, 1967 charged in the case of a person ordinarily resident in Malaya, as the appellant was, upon his income wherever derived. It is true that after 1973, this world derivation scope was changed back to the previous provisions, but the years concerning this appeal straddled section 10 Income Tax Ordinance, 1947 and section 3 Income Tax Act, 1967, as unamended. Effect will have therefore to be given to the provision for world derivation scope.

All it means of course is that for the years of assessment 1968 to 1972 inclusive, the profits assessed as income from the appellant's trade in gold, etc. whether derived in India or in Malaysia are caught and chargeable to tax and no question whether the income accrues in or is derived from Malaya arises. But this question does arise in relation to the previous years of assessment and it is this question on which I ask for counsel's special assistance. For the profits to be chargeable to tax, they would have to be accrued in or derived from Malaya or received in Malaya from outside Malaya.

On the facts found by the Special Commissioners it is undeniable however that the gold and other valuables were purchased from moneys in Malaya. The purchases were made in this country. In India these articles were not disclosed in his Indian Capital Statement. The appellant advanced the suggestion that it was for evasion of Indian tax. The Special Commissioners rejected this suggestion and inferred that they had been sold for the large profits to be derived from the sale. Counsel for Revenue suggests that the proper inference from the absence in the Capital Statement must be that the money was remitted back to Malaya. This suggestion was not previously advanced, though there was evidence that in 1961 a sum of $1,255,126 was brought back from India. The derivation of this sum has however not been determined. The appellant's foreign exchange dealings presented a clearer picture. The Special Commissioners found remittances from Malaya to India through unauthorised currency dealers at black market rates or payments of Malaysian currency in this country for Indian and foreign currency. The foreign exchange dealings were in the view of the Special Commissioners derived from Malaya, whether or not the profits were brought back to Malaya. The Special Commissioners did not however enlarge on this point and it becomes necessary for me to consider whether their conclusion is correct on the law.

I could have done with a more detailed submission from each side than I actually received and I could have wished for rather better facilities in the way of books than have been available to me.

In regard to the provisions in Malaysia of Malaysian currency in this country against payments of Indian currency in India, I do not think that any difficulty arises. The income from such dealings is clearly derived in Malaysia and is squarely caught by section 10, Income Tax Ordinance. At the very least, it could be said that the business from which the profits were derived was carried on in this country. But with regard to the remittances to India and the export of gold, the position was perhaps not as clear cut. Different considerations arose. If on the whole I come to the conclusion that the income from such dealings was not derived in this country within the ambit of section 10, then I would be compelled to remit this part of the case to the Special Commissioners for them to split up their findings of fact into two categories.

The decision must be determined by the proper construction of the word "derive". But the dictionary meaning is not of any great assistance and in any event their Lordships of the Privy Council in construing income "derived from lands of the Crown" under section 15(iii) of the Land and Income Tax Assessment Act of 1895 of New South Wales, "attach no special meaning to the word 'derived' which they treat as synonymous with 'arising or accruing' ": *Commissioners of Taxation* v. *Kirk*[10] at page 592.

The case of *Kirk* is of some topical interest and in my view, also of great guidance. The question that arose was whether income from the ore mined from lands of the Crown in Broken Hill in the Colony of New South Wales caught for taxation included the sales of the refined ore sold in Melbourne, Colony of Victoria. Their Lordships held that the profits were chargeable.

Following the process adopted in *Kirk's* case, there appear to be four stages in the earning or production of the income from the export of gold and the currency dealings in India — (1) The furnishing of the capital; (2) the use of this capital to purchase the gold or for the exchange of currency; (3) the sale of the merchantable product; and (4) the receipt of the moneys arising from the sale. Even if it is contended, as I must anticipate if the attention of the appellant is drawn to this moot point, that stages (3) and (4) were carried out in India and this fact might possibly support a submission that the income was not derived in this country, stages (1) and (2) remain to be considered. And *Kirk's* case decided clearly that it would be a fallacy "in leaving out of

sight the initial stages and fastening (their) attention exclusively on the final stage in the production of the income." On the facts of the case under review it could not be denied that the initial stages were carried out in Malaysia, so that if I am right in following and applying the *ratio decidendi* of *Kirk's* case, I must come to the conclusion that this source of income is chargeable to tax.

In the result, I therefore confirm the Special Commissioners' assessment of income tax on an estimated profit of $7,150,000 for the years in question.

(ix) *Losses re "Tamil Malar."*

Though the Tamil Malar was published in Malaya, the Special Commissioners found that the appellant had established a branch office in Singapore, and that this branch office was a separate establishment.

This finding of fact disposes of any claim for the deduction of the losses sustained by the Singapore Branch, as this court is bound by the decision of the Federal Court in *H.H. Co. Sdn. Bhd.* v. *Director-General of Inland Revenue*[11] that losses sustained by a Singapore branch which is a separate establishment cannot be brought in as a deduction in assessing the chargeable income of a taxpayer in Malaysia. That judgment was only delivered on January 19, 1976, after the Special Commissioners had made their Deciding Order, and wholly supports it. See also *U.N. Finance Bhd.* v. *D.G.I.R.*[12]

(x) *Loans*

It has not been shown to the Special Commissioners or to me that the personal interest-free loan to V.M. Sundram was connected with either his fragmentation or his money-lending businesses, or that the amounts subscribed to the Malayan Times Ltd., now in the hands of receivers, were anything more than investment write-offs. Neither could properly qualify as deductions within those permitted in the tax law.

Judgment

In all the circumstances of the case, it has not been shown to me nor am I for myself able to ascertain that the Deciding Order of the Special Commissioners erred in any way.

I therefore confirm the Deciding Order.

Appeal dismissed.

Solicitors: *Jayadeva & Zahir.*

THIANGIAH & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Ajaib Singh J.) September 15, 1976]

[Seremban — Criminal Appeal No. 3 of 1976]

Criminal Law and Procedure — "Attempt" — Meaning of — Appellants convicted under ss. 381 and 511 of the Penal Code read with s. 34 — Issue of whether act constitutes "attempt" within meaning of s. 511 of the Penal Code — Penal Code, ss. 34, 381 & 511.

In this case the first appellant was a senior conductor of the estate while the second appellant was a field worker who worked directly under the supervision of the first appellant. The first appellant was responsible for the bags of fertiliser taken out of the store. Both the appellants had only a day earlier taken back to the store in the first appellant's car 4 bags of fertiliser out of the 11 bags which were not used for the day. They returned to the place with the car between 6.30 p.m. and 7.00 p.m. when they were stopped from loading the remaining 7 bags into the car. Both the appellants were convicted under sections 381 and 511 of the Penal Code read together with section 34 of the Code. They appealed against the decision of the learned magistrate.

Held: (1) the mere forming of an intention to commit a crime and making preparations for its commission are not criminal acts and are not punishable under the law. There must be some further overt act on the part of the offender which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime in order to constitute an attempt within the meaning of section 511 of the Penal Code;

(2) the appellants might well have had the intention to steal the bags and might well have come prepared to take them away for their own use. But this was insufficient to constitute an attempt to steal. The overt acts of the appellants fell short of the actual attempt to steal as the acts were not immediately connected with the offence of theft.

CRIMINAL APPEAL.

A.K.J. D'Cruz for the appellants.

Razalli bin Hassan (Deputy Public Prosecutor) for the respondent.

Ajaib Singh J.: This was an appeal from the decision of the learned magistrate whereby the appellants were convicted under sections 381 and 511 of the Penal Code read together with section 34 of the Code. The first appellant was sentenced to one day's imprisonment and fined $1,500 in default six months' imprisonment and the second appellant was sentenced to one day's imprisonment and fined $500 in default three months' imprisonment.

The appellants were originally charged with theft of 7 bags of fertiliser valued at $108 the property of Ulu Sawah Division of Kombok Estate in the District of Seremban. The brief facts of the prosecution case before the learned magistrate were as follows. The first appellant was a senior conductor of the estate while the second appellant was a field worker who worked directly under the supervision of the first appellant. On November 4, 1974 the first appellant started manuring work on part of the estate with 60 bags of fertiliser taken out of the estate store. The fertiliser was issued by the store-keeper and according to standing instructions all unused bags of fertiliser were to be taken back to the store at the end of the day's work. For this purpose the management provided vehicles such as tractors, trailers and lorries for the conveyance of the bags to and from the fields. The transport was the responsibility of the store-keeper. On November 5, 1974 the first appellant was issued with 104 bags of fertiliser and at 6.15 p.m. on that day he brought back